No. 15,873

United States Court of Appeals

For the Ninth Circuit

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE and HARLAN L. McFARLAND,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of California, Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

Come now the Appellants, E. B. Hougham, Owen Dailey, William E. Schwartze and Harlan L. McFarland, and respectfully appeal to this Court from a decision of the United States District Court, Southern District of California, Northern Division, which assessed Appellants civil penalties totaling $8,000.00 as a result of certain alleged tricks and devices used in connection with the acquisition of War Surplus Property.

PLEADINGS AND FACTS SHOWING JURISDICTION.

This is a civil action brought by the United States as Plaintiff, under the provisions of Section 26(b) of the Surplus Property Act of 1944, 50 U.S.C.A.

§ 1635(b), repealed and reenacted as Section 209(b) of the Federal Property and Administrative Services Act of 1949, 41 U.S.C.A. § 239(b), and re-numbered 40 U.S.C.A. § 489(b), of which the District Court has jurisdiction by virtue of the provisions of Section 26(c) of the Surplus Property Act of 1944, repealed and re-enacted as Section 209(c) of the Federal Property and Administrative Services Act of 1949. (Paragraph I, Second Amended Complaint [56].)

Findings of Fact, Conclusions of Law, and Judgment in said action were signed by Judge Jertberg, Judge of the United States District Court, Southern District of California, Northern Division, on October 16, 1957, and Judgment was entered by the Clerk on October 18, 1957 [105-120].

Notice of Appeal from said Judgment was duly filed within 60 days from the entry thereof, on December 11, 1957 [122].

Bond for Costs on Appeal, and Designation of Contents of Record on Appeal were also filed, giving this Court jurisdiction of the appeal under the provisions of 28 U.S.C.A. § 1291, and 28 U.S.C.A. § 1294, since the question involved does not concern situations embracing a direct appeal to the Supreme Court as authorized by §§ 1252 and 1253 of Title 28 U.S.C.A.

STATEMENT OF THE CASE.

Defendant E. B. Hougham had been a used car dealer in Bakersfield for many years, and commencing

in 1944 for several years dealt extensively in Government surplus mobile equipment.

Defendant Schwartze is the stepson of Defendant Hougham. He entered the service and was discharged in the fall of 1945 and re-entered his father's business.

Defendant Owen Dailey was a long-time friend of Defendant Hougham, having business headquarters nearby before the War, at which time he was a representative of the Firestone Tire Company. He entered the service, was voluntarily discharged, and entered Hougham's business as Sales Manager in June of 1946.

Defendant McFarland before the War was a used car dealer in his own right, entered the service, was honorably discharged, re-opened his own business, in which he was supplied merchandise for re-sale by Hougham, who consigned stock to him for that purpose.

McFarland, Schwartze and Dailey qualified under California laws as used car dealers, and acquired licenses for that purpose. Each of them applied for a Veteran's Priority Certificate for purchase of Surplus Property. Hougham supplied the money, which was used in making the purchases under the Veteran's Priority Certificates between June and December of 1946. The instant action is concerned with the propriety of these transactions.

The original Complaint was filed December 31, 1954 [3]. Briefly, it alleged that the veterans in their Priority Applications certified that the articles were to be purchased for personal use only, that the repre-

sentation was false and known to be false by both the veterans and Hougham; that in truth and in fact the veterans made no purchase, but Hougham purchased, using the Veteran's Certificates, and damages in the amount of $2,000.00 for each act was prayed for [23].

Defendants appeared and moved to dismiss the action upon the grounds that it was barred by the Statute of Limitations. In a Memorandum Opinion Judge Jertberg held that the action was timely filed by one day [43]. Defendants answered denying the allegations of fraud, and caused interrogatories to be served upon the Government, which Interrogatories disclosed that the Veterans' Applications in respect to Owen Dailey and Harlan McFarland contained no statements that the articles were purchased for personal use only, but instead disclosed that the articles were purchased for re-sale. A motion for summary judgment, based on the Interrogatories, was made, in response to which plaintiff asked leave to amend, substituting the allegation of fraud from a misstatement in respect to personal use to an allegation that the veterans represented that they were the owners of the enterprise and had personally invested more than 50% of the capital in the enterprise, and were entitled to more than 50% of the profit in the enterprise, and that the articles were not purchased for the benefit of any other dealer, and prayed, instead of $2,000.00 damage for each item, for double the money agreed to be paid. Objection to this amendment was made upon the ground that it also was barred by the Statute of Limitations; it was a new and independent charge of

fraud and therefore did not relate back to the filing of the original Complaint; and upon the further ground that no relief could be afforded under that prayer for the reason that the transaction in question did not involve any sum "agreed to be paid".

During this argument the Trial Judge indicated that the amendment would not be allowed in that form, but that the amendment would be allowed if the original form of relief was asked, namely, $2,000.00 per item [43-54].

Thereupon the Government withdrew the Amended Complaint [54] and filed a Second Amended Complaint [54-72], which was allowed, and the Motion for Summary Judgment was denied.

Defendants answered the Second Amended Complaint denying the allegations of fraud, and pleaded three special defenses:

1. The action was barred by the Statute of Limitations since the original filing was not timely;

2. The cause of action set forth in the Second Amended Complaint was barred by the Statute of Limitations since it was different in form and substance from the original charge and therefore could not date back to the date of the original filing; and

3. A defense alleging that the activity of all the parties was within the objectives and policies set forth in the Surplus Property Act of 1944 and within the provisions of the regulations, and therefore not fraudulent conduct [74-88].

The case proceeded to trial without a jury upon the issues thus framed. Evidence was offered concerning the alleged false representations, all of which were contained in the Veterans' Applications to the War Assets Administration for veteran's preferences in purchasing Surplus Property, which appear in evidence as Plaintiff's Exhibits 1, 76, 94 and 97, which are set forth in the Transcript at pages 127, 206, 218 and 227, respectively. The balance of the exhibits, by and large, pertain to invoices respecting the purchase of the several items, all of which are marked "paid". Hougham advanced the funds for the payment of the same.

At the conclusion of the case the Court made Findings of Fact, Conclusions of Law, and entered Judgment, to the effect that the purchases made under each application constituted one violation, and accordingly judgment was entered against Hougham in the total sum of $8,000.00, McFarland in the sum of $4,000.00, and Schwartze and Dailey in the sum of $2,000.00 each [105-119].

The Findings of Fact failed to pass upon the third special defense in any respect. It was entirely omitted.

SPECIFICATION OF ERRORS.

Appellant respectfully urges the following errors:

1. Error in law by the Court in failing to dismiss the original Complaint upon the grounds that the same was barred by the Statute of Limitations.

2. Error in law by the Court in failing to grant Defendants' Motion for Summary Judgment.

3. Error in law by the Court in permitting the filing of the Second Amended Complaint because:

(a) It was different in form and substance from the charge contained in the First Amended Complaint and should have been the subject of a separate action, rather than an amendment; and

(b) Being different in form and substance from the original charge, for the purposes of applying the Statute of Limitations it could not date back to the date of the filing of the original Complaint.

4. Error in law in finding action timely filed.

5. The Judgment is not supported by the Findings of Fact since they fail to find upon the Third Special Defense.

6. The evidence is insufficient to support the Findings for the reason that it contains no false or fraudulent statements or any trick or device.

ARGUMENT.

POINT 1.

THE ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS SINCE THE ORIGINAL FILING WAS NOT TIMELY.

The Court erred as a matter of law in failing to dismiss the original Complaint upon the grounds that the same was barred by the Statute of Limitations.

> "The defense of Statute of Limitations may be raised by motion to dismiss when the times al-

leged in the complaint show that the action was not brought within the statutory period."

A. G. Reeves Construction Co. v. Weiss, 119 Fed. 2d 472;

Wright v. Bankers' Service Corp., So. Dist of Calif., 1941, 39 Fed. Supp. 980;

Moore's Federal Practice, 2d Ed., Section 12.10, page 2257.

The jurisdictional allegation of the Complaint in Paragraph I, First Cause of Action, shows that the relief sought is under the provisions of Section 26(a) of the War Surplus Act of 1944. It concerned itself with transactions occurring in 1946 (Paragraphs V, VI and VII of the First Cause of Action, Paragraph III of the Second Cause of Action, and Paragraph III of the Third Cause of Action [55-73]).

The action is in substance a civil action to enforce a civil penalty.

U. S. v. Witherspoon, 211 Fed. 2d 858;

U. S. v. Strange Bros. Hide Co., 125 Fed. Supp. 177;

Dugan and McNamara v. U. S., 127 Fed. Supp. 801;

U. S. v. Covollo, 136 Fed. Supp. 107;

U. S. v. Salvatore, 140 Fed. Supp. 470;

U. S. v. Temple, 127 Fed. Supp. 118;

Erie Basin Metal Products v. U. S., 150 Fed. Supp. 561;

U. S. v. Nilkey and Dawes, 151 Fed. 2d 639 (certiorari denied);

U. S. v. Strange Bros. Hide Co., 123 Fed Supp. 177.

The statutory period for maintaining an action to enforce a civil penalty ordinarily is five years. U.S.C.A. Title 28, § 2462, provides:

> "*§ 2462. Time for commencing proceedings.* Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon. June 25, 1948, c. 646, 62 Stat. 974."

Ordinarily the Statute of Limitations would bar the maintenance of this action as of December 31, 1951. However, U.S.C.A. Title 18, § 2387, provides:

> "When the United States is at war the running of any statute of limitations applicable to any offense committed in connection with the disposition of any real or personal property of the United States . . . shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent Resolution of Congress."

Technically the United States was at war, although hostilities had terminated in 1946, until noon of December 31, 1946, when by Presidential Proclamation hostilities were officially terminated as of noon on that date (Proclamation 2714 12-FR-1). By virtue of the Presidential Proclamation and the suspension of the statute of limitations the running of the statute was suspended *until three years after December 31,*

1946, or until December 31, 1949. The use of the word "until" is synonymous with "up to". In this respect the following decisions are in point:

U. S. v. Grainger, 346 U.S. 1069 (73 S. Ct. 1069) at page 1075 states:

> "When the President, December 31, 1946, proclaimed the termination of hostilities of World War II, 3 CFR, 1946 Supp. 77-78, this automatically caused the resumption of the running of statutes of limitations on December 31, 1949."

U. S. v. Choy Kum, 91 Fed. Supp. 769, at page 770, states:

> "It is therefore said that the Suspension Act did operate in this case to toll the running of the Statute of Limitations. If that be so, since the President, by Proclamation No. 2714, dated December 31, 1946, 50 U.S.C.A. Appendix, Sec. 601 note, 12 F.R. 1, declared hostilities terminated, and by the terms of the Suspension Act the Statute of Limitations did not begin to run until December 31, 1949, then obviously this June 28, 1950, indictment is timely."

When a period of time in which an act must be done is referred to as "to", "till", or "until" a certain date, such words usually exclude the specified date. *Louisville & N. R. Co. v. Scott,* 167 So. 572, 574, 232 Ala. 284. See also 43 *Words and Phrases,* 406, 407 and 408. California decisions are in harmony with this contention.

English v. City of Long Beach, 250 P. 2d 298, 303, 114 C.A. 2d 311, states:

> " 'Until' means up to a certain time, or place or event . . ."

The five year period of time provided by U.S.C.A. Title 28, § 2462, commenced to run December 31, 1949, and expired December 30, 1954. The time stamp on the original Complaint shows that it was filed December 31, 1954, one day too late [23].

By the same reasoning the Court was in error in permitting the filing of the Second Amended Complaint for by the time of its filing, by any process of reasoning, the five year period had run by over a year, if the pleading related to a different transaction than that in the original complaint.

If it be conceded that the original Complaint was timely filed, which we do not, nevertheless the Court should not have permitted the filing of the Amended Complaint for the further reason that its allegations were so different from and foreign to the charges of fraud contained in the original Complaint that they constituted an entirely new and separate cause of action which could not relate back to the date of the original filing. The Federal Rules of Civil Procedure, Section 15(c), are pertinent.

The difference in the matters set forth in the two Complaints are as follows:

The charge of fraud in the original Complaint was an alleged false representation that the articles were purchased for personal use. The alleged false representation contained in the Second Amended Complaint was to the effect that the veterans were the owners of more than 50% of the interest in an enterprise, and entitled to more than 50% of the profit in

the enterprise, and that the purchase for re-sale was not for the benefit of any other dealer [62, 66, 71, 72].

The writer is aware of a differing line of decisions based upon *U. S. v. Weaver,* 107 Fed. Supp. 963, and that this Court has indicated a leaning toward the Weaver decision in *U. S. v. Wilson,* 133 Fed. Supp. 882, where this Court held that an action filed on December 31, 1954, under the War Surplus Act was timely filed.

The reasons advocated in support of that opinion are different from the reasons advanced in this brief, and apparently the instant argument was not called to the attention of this Court in that hearing. Specifically, the Federal rule with reference to the computation of time would normally exclude the day on which the act was committed, in computing the statute of limitations. We do not have that problem here. We have a suspension "until" problem, and, necessarily, as soon as the suspension is lifted the statute must commence to run. By this process of reasoning December 31, 1954, was the day upon which the statute started, which would necessarily make the statute effective December 30, 1954, and not December 31.

It is to be further pointed out that under the reasoning of the Court in the *Wilson* case the cause of action alleged in the Second Amended Complaint being foreign to and different from the original allegation of fraud certainly is barred.

The foregoing argument covers Specifications of Error 1, 2, 3 and 4.

POINT 2.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE DEFECTIVE AND HENCE DO NOT SUPPORT THE JUDGMENT, FOR THE REASON THAT THEY FAIL TO FIND UPON DEFENDANTS' THIRD SPECIAL DEFENSE.

The Third Special Defense [85-88] alleges that the transactions complained of in Counts One, Two and Three of Plaintiff's Complaint were not isolated transactions, but were a part of a course of conduct carried on by Hougham and the veterans consistent with the general objectives and purposes of the Surplus Property Act of 1944.

Section 2 of the Surplus Property Act of 1944, 58 Stat., page 766, provides in part:

> "The Congress hereby declares that the objectives of this Act are to facilitate and regulate the orderly disposal of surplus property so as—
>
> (c) to facilitate the transition of enterprises from wartime to peacetime production and of individuals from wartime to peacetime employment;
>
> (f) to afford returning veterans an opportunity to establish themselves as proprietors of agricultural, business, and professional enterprises;
>
> (g) to encourage and foster post-war employment opportunities;
>
> (h) to assure the sale of surplus property in such quantities and on such terms as will discourage disposal to speculators or for speculative purposes;
>
> (l) to effect broad and equitable distribution of surplus property;

(n) to utilize normal channels of trade and commerce to the extent consistent with efficient and economic distribution and the promotion of the general objectives of this Act (without discriminating against the establishment of new enterprises);

(o) to promote production, employment of labor, and utilization of the productive capacity and the natural and agricultural resources of the country;"

Consistent with the policies contained in the Act the Third Defense alleged that Hougham conducted a wholesale and retail used car and truck sales business in which he offered to the general public, at reasonable and nonspeculative prices, commodities including war surplus materials; that he purchased the products from the veterans at prices deemed adequate by them, and that he assisted and encouraged them to establish and maintain themselves as proprietors of businesses; that he had known Dailey before the War, that he employed him after the War for a period of time in excess of six months and enabled such veteran to re-establish himself in the peacetime economy; that he had known McFarland as a wholesale and retail used car dealer for many years before the War, and that after the War he assisted him by consigning to him merchandise to operate his business and thus enable him to re-establish himself in the peacetime economy; that he was the stepfather of the defendant Schwartze and had raised him since he was 6 years old; that he had given him employment before and after the War, and that he enabled him to draw

on his business for necessary wants, and has helped and assisted him to establish himself in business; that Hougham himself, between 1944 and 1948, had been a consistent customer of the United States on his own account, and that the transactions set forth in the Complaint constituted but 10% of the gross business of Hougham in war commodities during the year 1946.

Evidence was offered in support of this pleading, and the evidence is undisputed. The record in this regard is as follows:

Testimony of Hougham: Transcript 394-420;

Testimony of Dailey: Transcript 191-200;

Testimony of McFarland: Transcript 349-362;

Testimony of Schwartze: Transcript 305-311.

The fact that the transactions complained of were not isolated transactions but were a minor part of Hougham's policy in assisting the veterans to rehabilitate themselves and in placing the commodities on the market in an equitable and orderly fashion is, to the writer, conclusive proof that there never was any contemplated, or any, fraud, trick or device undertaken or engaged in by any of these defendants.

There is no law or regulation which makes conduct of the character here outlined illegal, or which makes it amount to any fraud, trick, or device. The policy of the War Surplus Act, previously noted, is to encourage and foster post-war employment opportunities and to encourage and utilize normal channels of trade and commerce. That is the broad result of the entire transactions which are the subject of this action.

The War Surplus Act provides for dispositions to veterans as follows. Section 16 (Stat. 58, page 773) provides:

"DISPOSITIONS TO VETERANS

SEC. 16. The Board shall prescribe regulations to effectuate the objectives of this Act to aid veterans to establish and maintain their own small business, professional, or agricultural enterprises, by affording veterans suitable preferences to the extent feasible and consistent with the policies of this Act in the acquisition of the types of surplus property useful in such enterprises."

The type or character of the "enterprise" is in no way limited in the War Surplus Property Act, nor has it been defined in the regulations.

Pursuant to the authority extended by Section 16 of the Act Regulation 7 was issued, and on October 15, 1945, was amended, and the amendment appears in the Federal Register of October 16, 1945, at page 12849. In this Regulation the Board sought to narrow the objectives of the War Surplus Property Act by inserting restrictive definitions.

Section 8307.1 defines "own business enterprise" to be one of which more than 50% of the invested capital or net income thereof is owned by or accrues to a veteran or veterans. "Small business enterprise" includes a commercial or industrial enterprise having not more than 500 employees.

Section 8307.3 provides for veterans' preferences and specifically includes property to be resold, with or

without fabrication, in the regular course of business. Maximum and minimum limits as to value and quantity may be established by the Board.

Section 8307.4 provides that the Board shall satisfy itself through reference to the applicant's discharge papers, or other evidence, that applicant is a veteran and that the property applied for is to be used in his own small enterprise, and shall require of the applicant a supporting statement or affidavit.

Section 8307.5 provides that surplus property may be sold or offered for sale on credit.

These regulations remained in effect until June of 1946, when the term "own business" was more restrictly defined, as follows:

> "Own business or profession or agricultural enterprise of a veteran means one of which more than 50% of the invested capital thereof is beneficially and not nominally or formally owned by a veteran or veterans, or one of which more than 50% of the net income beneficially and not nominally or formally accrues to a veteran or veterans."

In other respects the new regulation is the same.

These regulations do not purport to define the word "enterprise". Neither do they purport to restrict the purchase of war surplus by veterans on borrowed capital. Nor do they restrict the class of persons to whom merchandise may be resold.

In order that any arrangement between persons may be considered a fraudulent trick or device or a

conspiracy, some wrongful or illegal objective must be the ultimate goal. The special defense in question presents this basic issue, and the judgment entered without a finding upon this defense should not be allowed to stand.

POINT 3.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF ANY FRAUDULENT TRICK, SCHEME OR DEVICE.

In every instance in this case the government dealt with the veteran and sold to the veteran. Before dealing with the veteran on a preferential basis the government satisfied itself that the veteran was qualified to purchase. It did so by reference to the veteran's discharge papers, and a statement regarding the property desired, and other satisfactory evidence that the property applied for was to be used in his own small enterprise. It did so by supporting affidavits, all as provided by § 8307.4 of S.P.A. Regulation 7.

It is the position of appellant that the evidence fails to support the finding of any trick, scheme or device used by any of the parties because no misrepresentation was made, either as to the veterans' qualifications or as to the intended use of the property.

Although substantially the same, the supporting statements and affidavits do vary, and for this reason they will be considered separately. In each case they disclose upon their face that no inquiry was made by the disposal agency as to the specific nature or character of the "enterprise". Apparently the early policy

of the surplus agency was not to make a detailed investigation as to the nature or the extent of the enterprise, for all of the supporting affidavits relied upon by the government are blank in this respect. This policy becomes more apparent in the light of Exhibit D, [426-434] which is a form letter issued in November of 1946, after all of the transactions in question had taken place, announcing a change in the policy in this respect and requiring specific information concerning the nature, character, extent and location of the enterprise, and a letter from a Bank or Chamber of Commerce verifying the same, and also a copy of the lease or other evidence of title to the premises, if any, occupied.

The heart of the government's case seems to be that false statements were made in the application, which induced the issuance of the priority certificate. We will therefore examine the same individually.

A. With respect to Owen Dailey.

Plaintiff's Exhibit 1 [127] is the Application of veteran Owen Dailey. It is submitted that all of the data set forth on the face of the Exhibit is true—his name, his address, city, name of enterprise, address of enterprise, statement that the enterprise was a retailer and wholesaler of truck and automotive sales, the statement that the stock was for resale to establish and maintain business.

On the reverse side, question No. 9, "Do you desire credit in the purchase of any of the items listed?"; answer, "No". No credit was asked of the War Assets

Administration in connection with this transaction. It follows that this answer is also true. Question No. 10-A, "Working capital invested or to be invested in this enterprise by proprietors"; answer, "$35,000.00—personal fund. By bank loan, Bank of America". A letter of credit was presented, signed by Mr. Hogan of the Bank of America. It follows that this statement is also true. Questions No. 10-B and C are estimates only. Question No. 10-C, "How much storage space will be needed?"; answer "One-half square block". "Already obtained?"; answer, "Yes". Dailey had arrangements with Hougham for the use of the storage space. Question 10-D, "If licenses for this type of business have been obtained, give date and license number"; answer, "Applied for". Question No. 11, "Branch of service"; answer, "Air Corps". "Date of release"; answer, "June 27, 1946". The answer to this question is also true. Dailey served in the Air Corps and was discharged as a Lieutenant. In answer to Question No. 12, Dailey merely signed his name. The entire body of Part 12 is stereotyped language of the Application. Question 12(A), "I qualify for the purchase of surplus property as a veteran, having served in the active military or naval service of the United States during World War II on or after September 16, 1940 and prior to its termination, and having been discharged or released therefrom under honorable conditions" is true.

Question 12(B) "That the enterprise described herein is one of which more than 50% of invested capital or net income thereof is owned by or accrues

to me" is the only part of the question having any materiality. Note particularly the language "enterprise described herein". This language is important for the reason that it is at once apparent that no description whatever of any specific enterprise was asked for in the application. Wholesaler and retailer of truck and automotive sales—license applied for. This answer cannot be said to be false for the reason that specific information was not requested [195].

Under the laws of the State of California, one can become an automobile dealer by taking out a business license and a retail sales tax permit. The business or profession of buying merchandise for used car dealers is one commonly known to the automotive industry since its creation [192, 395, 396]. Therefore, it cannot be said that the answer to question 12(B) is in any sense false.

Question 12(C) is obviously inapplicable because question 10 fully indicates that the representation was made that the property was for resale. The answer to question 12(C), subdivision (II), is true.

Question No. 12(D), "That I am not purchasing the property herein described for the benefit of any other enterprise, dealer, broker, merchant, or other undisclosed partner or principal" is true in the sense that Dailey did receive a benefit [194]. It is obvious that whenever property is purchased for resale, persons other than the initial merchant will also benefit; otherwise, there would be no motivating factor creating the sale. The fact that Hougham also benefited is immaterial.

The final question 12(F) states "That all of the statements made in this application are true and complete to the best of my knowledge and belief". Dailey's activity under this application consisted of the following: (a) Borrowing money from Hougham; (b) using the money so borrowed to make the purchase; and (c) reselling the property to Hougham. This course of conduct, it is submitted, fails to show that at the time of the application for priority that either Hougham or Dailey had any intent to in any way defraud the Government. On the contrary, it is submitted that this course of conduct showed that both Hougham and Dailey specifically complied with all of the rules and regulations laid down in the War Surplus Property Act or in the Regulations issued thereunder.

The application was dated July 29, 1946, at which time Regulation No. 2, which is found in Federal Register of May 10, 1946, page 5125, was in effect. Section 8302.8 regulates the issuance of certificates to veterans. Subdivision (a), in part, states:

> "War Assets Administration will satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the Applicant is a veteran and that the property applied for is for his own personal use or to enable him to establish or maintain his own small business, professional, or agricultural enterprise, and shall require of the Applicant a supporting statement or affidavit."

The supporting statement of Dailey is Plaintiff's Exhibit 1 [127]. Had further information been desired,

a suitable request could have been made at the time of the application, which was apparently not done. Apparently at this time it was not the Government's policy to require further information than that requested, because it appears that at a later date in November all veteran dealers' priority certificates were recalled and further and more specific information required as a condition to their re-issuance. (See Defendants' Exhibit D [426-434].)

There is nothing in the Regulation which prohibits surplus purchases with borrowed money. To the contrary, the Act and the Regulation specifically provide for sales on credit. Section 8302.8, Subdivision (d), provides:

> "Surplus property may be offered for sale to veterans on credit on terms and conditions established by the disposal agencies."

Neither does the Regulation contain any limitation in respect to persons entitled to purchase property from veterans after the veterans have acquired the same from the Government. Any such purported limitations would be contrary to the objectives of the Surplus Property Act and void. *People v. Finn Twins,* 127 Fed. Supp. 158, affirmed on appeal by Circuit Court (239 Fed. 2d 679); *School District v. United States,* 229 Fed. 2d 681; *Hagger v. Helvering,* 308 U.S. 389, 60 Sup. Ct. 337; *Sanford v. Commissioner,* 308 U.S. 39, 84 Law Ed. 20; *Barnett v. Chicago Portrait,* 285 U.S. 1; *Dragoon v. United States,* 144 Fed. Supp. 188.

If it is proper to purchase surplus property on the credit of the government or a Bank, why is it not proper to purchase surplus property with funds borrowed from a friend? If it is proper to purchase surplus property for resale to anyone, why is it not proper to purchase property for resale to a used car dealer? If there is nothing irregular in purchasing surplus property with borrowed capital, and if there is nothing irregular in selling surplus property purchased with borrowed capital to a car dealer, why should the transaction become "tainted" when the lender and the dealer happen to be the same person? Two rights do not make a wrong.

This is the foundation upon which the government's case is constructed. It is submitted that such an interpretation of the regulations is contrary to fundamental rules of law. The case of *John A. Roebling's Sons Co. v. Industrial Accident Commission,* 36 Cal. App. 10, at page 14 states:

> "Where various theoretical conclusions may be drawn from the state of facts established, each being equally plausible, . . . then it may not be said that the evidence is sufficient to sustain the case of him upon whom the burden of proof rests."

And on the petition for hearing:

> "The justices opposed to granting the application for a hearing in this court are of the opinion that the opinion of the District Court of Appeal means that in this case there was no substantial evidence reasonably warranting an inference favorable to the claim . . . and that any finding to

the contrary is necessarily based on mere surmise, speculation, or conjecture . . ."

Coffman v. California State Board of Architectural Examiners, 130 Cal. App. 343, 19 Pac. (2d) 1002 at page 1004 states:

"The act does not attempt to define what constitutes dishonest practice, for the very good reason, perhaps, that such dishonest practice assumes such a wide range and variety of acts and misconduct that a definition could not embrace its many forms, *but for that reason the acts complained of should be found with such definiteness and certainty that the vice of the acts complained of might be apparent to all.*"

2 Cal. Jur. 2d 248, Section 145, states:

"The findings, decision, and orders of administrative agencies must be supported by evidence of sufficient probative force to establish the fairness of their action. While disciplinary proceedings involving the revocation or suspension of licenses are not criminal in nature, *all intendments are in favor of the accused and the charges against him must be proved by clear and convincing evidence* before the right to engage in the licensed profession or business may be taken away. *An administrative determination must be supported by something more than suspicion or conjecture, speculative, theoretical conclusions surmise, fanciful or fictitious pretense, inherent improbability, or uncorroborated hearsay or rumor.*"

The interpretation of the regulations contended for by the government are contrary to the plain language and policy of the War Surplus Act and for this reason they should not be allowed to stand.

It follows that the evidence in respect to Owen Dailey wholly fails to support a finding of fraud, trick or device in connection with the acquisition and/or disposition of War Surplus property and for this reason the judgment should be reversed.

B. With respect to Harlan McFarland.

McFarland made two applications for surplus property; one on March 20, 1946, and the second on July 2, 1946. The latter application will be discussed first, since it was applied for at a time when War Assets Administration Regulation 2 was in effect. The evidence shows that Harlan McFarland had been a used car dealer before the war, entered the service, and was honorably discharged in late 1945; that he attempted to re-establish his business but was unable to secure merchandise due to O.P.A. ceilings; that he entered into a consignment arrangement with Hougham, who stocked his used car lot by placing a flooring price upon each vehicle, which was repriced by McFarland and sold to the general public. McFarland retained the spread between the cost and the sale price, maintained his own lot, paid for his own help, lights, etc. McFarland also acted as a buying dealer, borrowed money from Hougham, purchased surplus under a priority application, sold the same to Hougham at a $10.00 per vehicle profit, and resold approximately one-half of his purchases to the general public after the same had been consigned to his lot by Hougham [349-352; 358-362].

His priority application is Plaintiff's Exhibit 94 [218]. The information on the front page is, without

exception, true. He maintained his business at 1200 East 19th Street, Bakersfield, California, and it was operating at the time. Photographs of the business are in evidence, Defendants' Exhibit C [353-355].

On page 2, section No. 18 of the application, McFarland signed the certificate, the language of which is entirely the language of the Government. He certified "I am or will be the sole proprietor of the enterprise described herein". The evidence bears out this contention and this assertion in every respect. The words "That no persons other than veterans will have any proprietory interest in the enterprise in excess of 50% of either the capital invested in the enterprise or of the gross profits or income thereof" are likewise true, for McFarland had and maintained his own individual enterprise. He further certified "I am not procuring the property listed in this application for the purpose of resale". This is obviously directly inconsistent with the information supplied on the face of the application to the effect that he was an automobile dealer, Dealer's license No. 3116-B/ED18417. See *Lee v. U.S.,* 167 Fed. 2d 137; *American Publishing Company v. Landwehr,* 80 N.Y.Supp. 2d 193.

Under no stretch of the imagination could any person be lead to believe that an automobile and truck dealer would buy 25 trucks for purposes other than resale. There is no evidence of any trick, device, scheme or arrangement of any kind that is not entirely legal in respect to this application.

McFarland's first application, Plaintiff's Exhibit 97, [227] is dated March 20, 1946. At that time,

Surplus Property Regulation No. 7 was in effect. It appears in Federal Register of October 16, 1945, commencing at page 12849. It is substantially the same as the previous regulation, although in some respects less complete. For instance, Section 8307.1(b) defines:

> " 'Own' business or professional or agricultural enterprise means one of which more than 50% of the invested capital or net income thereof is owned by or accrues to a veteran or veterans."

It specifically authorizes veterans to purchase property for resale under priority. Section 8307.3, in part, provides:

> "Such preference shall extend to property necessary to establish and maintain their own small business, agricultural and professional enterprises, and, within reasonable limits commensurate with the enterprise established or to be established and in commercial lots appropriate to the level of trade, to one initial stock of property to be resold with or without processing or fabrication in the regular course of business."

Section 8307.4 provides:

> "Smaller War Plants Corporation shall satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the applicant is a veteran and that the property applied for is to be used in his own small enterprise, and shall require of the applicant a supporting statement or affidavit."

Section 8307.5 provides:

> "Surplus property may be offered for sale on credit on terms and conditions established by the disposal agencies."

Nowhere in this regulation is there a requirement that the veteran refrain from purchasing on borrowed money. Nowhere in the regulation is there any restriction as to persons to whom the veteran may resell the property purchased under the priority.

Section No. 2 of this application, in reference to mailing address, contains "114 Market Street, San Francisco", which is lined out and over the same "1200 East 19th St., Bakersfield, Calif." Section No. 5, address of enterprise, "2401 E. 14th St., Oakland, Alameda, Calif." shows on its face an inconsistency because it is contrary to section No. 2, mailing address. McFarland at this late date does not remember the reason for the inconsistency, but never had a business at that address, and always had his business at 1200 East 19th Street, Bakersfield, California. [348]

Conceding this answer to be a misstatement, it does not follow that a trick or device or scheme was perpetrated upon the Government by the mistake. There was no evidence offered to the effect that veterans in any particular area were entitled to any particular preference, and the Regulation itself applies throughout the continental United States. See Section 8307.2. Mr. Karl F. Koenig, called as a witness for the Plaintiff, was chief of the sales branch of the Federal Supply Service Utilization for Profit, Division of the General Services Administration (Reporter's Transcript, [234]) and was with the War Assets Administration as surplus property disposal officer in 1946 [335]. He testified that there was no territorial distinction in reference to veterans [265].

The other statements upon the face of the application are, without exception, true. The enterprise had been established before the war; it was at the time of the application not being operated. He intended to operate "as soon as stock can be purchased". His experience was given as "Auto sales & service business since 1933". On the reverse side, under section 18, he signed the stock certificate formulated by the Government to the effect that "he was a veteran", which was true; "honorably discharged", which was true; "that he was the sole proprietor of his busines", which was true; "that no persons other than veterans will have a proprietory interest in the business, singly or together, directly or indirectly, in excess of 50% of the capital invested in the enterprise", which was true; or "of gross profit or income therefrom", which was true.

The certificate further stated "I am not procuring the property listed in this application for the purpose of resale, and that said property is to be used in and as part of the enterprise described herein". It is obvious that this is an inconsistency and not a false statement, for on the face of the application he stated that his enterprise was a truck sales and service business, and that he intended to use the stock applied for in the business. As stated in the *Lee* case, previously cited, there is no inconsistency such as could be made the basis of a trick or device.

The money used for the purchases made under the priority application was money loaned to him by Hougham. The sales were made to Hougham after

the purchases had been completed from the Government. For the reasons stated in the argument in respect to Dailey, there is no concealment of any kind, and the things done were in strict compliance with the provisions of the War Surplus Property Act and the Regulations Nos. 7 and 2.

C. With respect to William E. Schwartze.

Schwartze was the stepson of the defendant Hougham, and had resided in his home since the age of six. He entered the service and was honorably discharged in the fall of 1945, after which time he made an extensive buying tour of war surplus disposing agencies with his father. [305] Upon this tour, it became apparent that there was a demand for a trucking rental and service business created by purchasers of war surplus material who had difficulty in securing transportation for the same away from the surplus yards. [306] He decided to commence such a business, intending to operate it himself, to secure the funds from his father, and to repay his father out of the business. [307] The father supplied the funds which eventually purchased trucks and trailers applied for by Schwartze under a veteran's application for surplus property, which appears in evidence as Plaintiff's Exhibit No. 76. [206]

This application gives "525 Jones Street, San Francisco", as a mailing address; the nature of the enterprise "Schwartze Truck Rental"; address of enterprise "525 Jones Street, San Francisco"; description of enterprise "Truck rental"; individual proprietorship.

Question No. 7, "Is the enterprise already established", has a garbled answer. Apparently the word "No" is written after the word and upon the word "Yes", because the following question, "If 'yes', are you now operating it?", is answered "no". Question, "How and when do you plan to start your operations if you are starting a new enterprise or buying into an existing enterprise?"; answer, "I plan to start with the surplus units I obtain".

Question No. 9, "What experience, training, and/or education have you had which you believe assures the success of this enterprise?"; answer, "Have worked for a truck dealer as a salesman".

Application was made for fourteen trucks and fifteen low-bed trailers, heavy duty. Under question 18, the usual Government certificate was signed by Schwartze.

Immediately after the acquisition of the material, and while transporting the same away from the surplus center, Schwartze was stopped by a California Highway Patrolman, who branded the trailers as too wide for use upon California highways. The trucks were found to be too uneconomical for civilian use. The project was abandoned and the equipment purchased was disposed of through Baker's Motor Market by Hougham [308].

It is submitted that there is nothing in this application which in any way amounts to a trick or device of any character. The San Francisco address is unimportant because there was no territorial limitation

in effect, according to the testimony of Karl Koenig, and because of the provisions of Surplus Property Board Regulation No. 7 previously noted. This Regulation was in effect at the time of this application. The state of mind of the applicant at the time of the signing of the application is the important feature, insofar as Schwartze is concerned. There is no reason or evidence in the record by which any doubt can be cast upon his veracity, insofar as his intention to enter into the trucking business is concerned. The fact that he abandoned the project does not make the acquisition of the property fraudulent. This identical situation existed in the *Lee* case previously cited.

In the Complaint, Schwartze is charged with making purchases in June, July, August and September of 1946, covering items which do not appear upon the surplus application, Exhibit 76. Apparently they were purchased under the provisions of Section 8307.7 of Regulation 7, as purchases without exercising preferential rights. At any rate, there is no proof of any alleged fraudulent representation in reference to their acquisition.

D. With respect to E. B. Hougham.

It is submitted that the record is totally devoid of any irregularity of activity upon Hougham's part.

There is no prohibition in the War Surplus Act against loaning or advancing money to veterans. There is no prohibition in the War Surplus Act or in the Regulations restricting any veteran from dealing with a used car dealer after acquiring property from

the Government under a preferential application. Hougham took no part in the signing of any application and was not present and had no knowledge of any statement made by any applicant in connection with the application. Knowing that certain properties were set aside for veteran dealers, he made no attempt to deal with the Government direct, but dealt in the manner prescribed in the Act and Regulations, which gave the preferential benefit to the veteran with whom he dealt [406-418]. He is in every respect a bona fide purchaser of every article which he acquired through the veterans.

This is not a case such as *U.S. v. Comstock Extension Mining Company,* 214 F. 2d 400, where parties knowingly entered into a combination to defeat restrictive regulations which limited certain items to veterans for their personal use only. There the veteran certified that the article was for his personal use, he went to the disposal center with the other parties who advanced the money, acquired title to the jeep, turned it over to them immediately, and they practically drove it off the lot. There unquestionably was a deliberate false representation in that veteran's application which was known by all parties.

In this case, the representation in the case of McFarland and Dailey was that they were automobile dealers, and they were, in fact, qualified under the laws of California to engage in that business. They did nothing except what they purported to do in their application. In the case of Schwartze, he bonafidely

intended to enter the truck rental business and this intention was frustrated.

This is simply a case where the surplus administrators satisfied themselves that the veterans were qualified to acquire surplus property for resale. Had they wished more specific information, they should have inquired for it.

Both Hougham and the veterans are entitled to the view that the transactions were bona fide, since there is no law or regulation prohibiting or restricting a transaction of the character here involved.

Section 25 of the War Surplus Act provides:

"TITLE OF PURCHASER

SEC. 25. A deed, bill of sale, lease, or other instrument executed by or on behalf of any Government agency purporting to transfer title or any other interest in property under this Act shall be conclusive evidence of compliance with the provisions of this Act insofar as title or other interest of any bona fide purchasers for value, or lessees, as the case may be, is concerned."

The statutes and regulations under which this action is brought are penal in character and as such should be construed strictly against the State and in favor of these defendants. They should not be enlarged by implication or intendment beyond the fair meaning of the language used, and should not include offenses and persons other than those clearly described and provided for. 82 C.J.S. 924, § 389 and § 390.

CONCLUSION.

It is submitted that the instant action was filed untimely, that the special defense of the broad policy of the War Surplus Act was ignored, that the statutes under which the action was brought have been construed against rather than in favor of the defendants, and that the evidence, fairly taken and properly construed, fails to show any fraudulent trick, scheme or device used in connection with the acquisition of any surplus property by any of these defendants.

For each of these reasons a reversal should be in order.

Dated, Bakersfield, California,
June 16, 1958.

Respectfully submitted,
CONRON, HEARD & JAMES,
By CALVIN H. CONRON, JR.,
Attorneys for Appellants.

(Appendix Follows.)

Appendix

Table of Exhibits offered and received in evidence.

Exhibit No.	Offered and received.
1	126 — 129
76	206 — 209
94	218 — 220
95	221 —
97	226 — 229
D	426 — 434